Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

CASE NO. 80-673

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WALTER TAYLOR,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF ALABAMA

Fred Pickard
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QUESTIONS PRESENTED FOR REVIEW

1. Were the petitioner's rights violated when the trial court refused to require the prosecutions witness, who was an undercover officer, to reveal the identity of the informer, where the informer was a witness to the transaction which served as the basis of the criminal charge against the accused?

2. Was the cumulative effect of the trial court not allowing the accused to offer evidence to cooberate his alibi, and then allowing the prosecution to impeach his testimony with prejudicial questions lacking a factual predicate, of such prejudice to the accused that he did not get a fair trial and was denied due process?

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CASE NO._____

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OCTOBER TERM, 1980

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V.

STATE OF ALABAMA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF ALABAMA

The petitioner, WALTER TAYLOR, prays that a writ of certiorari issue to review the opinions and judgments of the Supreme Court of Alabama and/or the Court of Criminal Appeals of Alabama rendered last in these proceedings. Petitioner seeks review of that Order and of any and all Orders by both Courts, certified copies of which are included in both appendicies

herein.

OPINIONS BELOW

The opinions of the Supreme Court of Alabama, appear at Appendix B, infra. The opinions of the Court of Criminal Appeals of Alabama, appear at Appendix A, infra. The opinion of the Supreme Court of Alabama, appear at Appendix B, infra.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari to the Court of Criminal Appeals without opinion was entered on August 15, 1980. This petition for certiorari was filed less than sixty days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. § 1257. Petitioner has asserted below and asserts here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment V,

> "No person shall be deprived of life, liberty or property without due process of law."

Constitution of the United States,

Amendment VI,

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witness against him..., to have compulsory-process for obtaining witnesses in his favor, and to have assistance of counsel for this defense."

Constitution of the United States,

Amendment XIV,

> "No state shall deprive any person of life, liberty or property without due process of law... nor deny any person the equal protection of the laws..."

STATEMENT OF THE CASE

The Petitioner, Walter Taylor, was indicted for Violation of the Uniform Alabama Controlled Substance Act in May of 1979. He was charged with selling four diazapams, a controlled drug under Alabama law. He was convicted by a jury on October 19, 1970, and was sentenced to seven years in the penitentiary. Taylor gave notice of appeal on November 8, 1979.

Taylor filed a Motion for New Trial on November 30, 1980, alleging that the trial court erred when it refused to allow certain motel and car repair receipts he had received to cooberate his alibi testimony that he was out of the state on the date and time he was alleged to have sold drugs (T. 100-109). The Motion for New Trial also aserted the ground that the trial court erred by allowing the prosecution to impeach Taylor's alibi by asking prejudicial questions lacking a factual

predicate. An example of this type of question which was asked repeatedly is found on page 112 of the trial transcript wherein, the prosecution asked the accused,

> "would you be surprised that Mr. Downsburg is the owner of the motel ...and that Mr. Downsburg's records do not have your name at all."

The defense constantly objected to such line of questions (transcript page 111, 112 and 113) and was repeatedly overruled. Objections were made on the ground that the prosecutor was stating something as a fact and that was not evidence (T.114). Exceptions were taken to the trial court overruling the above objections. The prosecution never offered any testimony which would cooberate the questions asked lacking a factual predicate. The accused attempted to offer many motel receipts and car repair receipts to cooberate the fact that he was out of state (T. 100-107). The trial court refused to admit any of

of the defendant's exhibits into evidence by sustaining objections of the State. Exception was taken to the trial court's ruling (T.107). The trial court rejected the two grounds of error asserted by Walter Taylor and overruled his Motion for New Trial on December 4, 1979. On the same date, probation was denied.

A brief was filed on appeal to the Alabama Court of Criminal Appeals alleging that the cumulative effect of denying the accused to offer evidence to cooberate his alibi, and allowing the prosecution to impeach the alibi with prejudicial questions lacking a factual predicate, denied Walter Taylor a right to a fair trial and to offer evidence in his defense (page 14 of Appellant's brief on appeal to the Court of Criminal Appeals). The Court of Criminal Appeals affirmed the lower court without rendering an opinion on April 1, 1980.

The same issues were raised in a brief on Application for Rehearing to the Court of Appeals on April 14, 1980. Rehearing was denied by the Court on April 22, 1980.

Walter Taylor then filed a Petition for Writ of Certiorari with the Supreme Court of Alabama on May 5, 1980 and again raised the previously mentioned issues. The Petition was denied on August 15, 1980 with no opinion.

The judgment of the Court of Appeals and the Alabama Supreme Court were without opinion. It must be assumed that the courts searched the record on appeal for any error. In searching the record it is shown that the narcotics agent, Michael Ware, was present with an informer at the time and place the alleged offense was supposed to have occurred (R.51). "Whoever this confidential informer was, went with you" "yes sir", "Walt Taylor saw this confidential informer?" "yes sir". The

defense asked (T.42), "and who was this confidential informer?" Objection by the State was sustained, the defense asked to be heard, the court denied the request and the defendant excepted to both rulings of the court on page 42 and 43 of the transcript.

The defense asked Mr. Ware the question "where did he (the informer) live?" on (T.43), the prosecution objected and the court sustained again at (T.50), Mr. Ware was asked "who was the informer." Objection by the state sustained. Sgt. James Sims testified for the state that he was officer Ware's supervisor, that he went to the general vicinity of the house where the offense is alleged to have occurred, but did not go in (T.72). When Sgt. Sims was asked, what was the name of the informer, he testified that he did not know (T.82). Officer Ware was previously asked if the confidential informer had given information in the

past which had led to arrest and convictions (T.58). His answer was "you will have to get that information from Sgt. Sims." When Sgt. Sims was asked this same question, he testified that the informer had not given him any information in the past which led to arrest and conviction.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE DECISION BY THE STATE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Petitioner contends that the trial court erred by not requiring disclosure of the identity of the informer. The Court in deciding the case of Albert Roviaro v. U.S. 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2nd 639 (1957) set forth the guidelines for determining when the identity of an informer must be revealed. The court stated that the purpose of non-disclosure was to further the protesting of public interest in effective law enfor-

cement and encourage the law of information to law enforcement. This purpose however, must be balanced against an individual's right to prepare his defense and the fundamental requirement of fairness. When disclosure is helpful as relevent to the defense, or essential to a fair determination of a cause, the privilege of non-disclosure must give away. The Court said no fixed rule was justifiable and the Court must look to the circumstances of each case.

In Roviaro the Court did cite several factors to consider to determine if disclosure must be made, and stated:

1. The offense charged must be considered.
2. The possible defense.
3. The possible significance of the informer's testimony and;
4. other relevant factors.

Petitioner contends the circumstances present in his case, dictate that disclosure of the identity of the informer should have been required. Taylor was charged with selling a drug to Officer Ware, though the informer was not named in the indictment, but for Ware, the informer might be Taylor's only material witness. He went to the house when and where the alleged offense took place. Roviaro pointed out that the opportunity for the defense to cross examine the policeman was a poor substitute for calling the informer as a witness. In Taylor's case, there was testimony that another white male was in the house when the drugs were sold. Perhaps the informer would testify that Officer Ware was incorrect and that it was not Taylor, but the other white male who sold the drugs. The informer was the only one who could contradict Ware's testimony because he

took part in the transaction. His testimony might also have disclosed entrapment on the part of Ware, thus the informer's testimony was possibly very significant.

Other factors should have also been considered by the trial court which would have compelled disclosure of the informer's identity. Officer Ware did not know if the informer had given reliable information in the past and Sgt. Sims testified the informer had not, and that he did not even know the name of the informer. Mr. Ware had to refresh his recollection from his notes. Ware stated that Sgt. Sims gave him the address for Taylor's house (T.64), however Sims testified he did not know the correct address for Taylor (T.89). Ware further testified that he was wrong in writing his report that Taylor had a beard. Taylor later testified in his own behalf that

his correct address on the date of the offense was not the same address Ware testified he went to (T.93). It is also interesting to note that on the date of the alleged offense, Officer Ware had been a policeman for a little over one year (T. 62). With all these discrepancies present in the testimony of the two officers, and with the apparent lack of accurate recollection on the part of the officers, the identity of the informer and the possibility of his testimony being very relevant and helpful to the defense, became more apparent, and the privilege should fall.

Petitioner contends that in balancing the interest of protecting the identity of the informer and requiring disclosure, the facts in support of disclosure in this case far out weigh non-disclosure of an informer, whose name was not known by Sgt. Sims, and who according

to Sgt. Sims, had not given reliable information in the past. It is also interesting to note that this identity of confidential informant, if he in fact existed, was according to Mr. Sims, known by Mr. Taylor at the time of the alleged offense (T.81). If Taylor knew the identify of the informer, why all the effort to avoid disclosure. This also raises some serious questions and certainly should compel disclosure.

Alabama also adopts the law set forth in Roviaro. See Davis vs. State, 51 Ala. App. 501, 287 So.2d 243 (1973) and Davenport vs. State, 50 Ala. App. 321, 278 So.2d 769 (1973). Alabama law requires disclosure of the identity of an informer whether the informer was a witness to or participated in the transaction which serves as the basis of the criminal charge against the accused. See also Kenny vs.

State, 50 Ala. App. 501, 280 So.2d 206 (1973) and Hood vs. State, 47 Ala. App. 192, 252 So.2d 117 (1971).

Petitioner contends that the state court ruling on the issue of disclosure is not only in conflict with the decisions of this court, but with the state court as well.

II. THE DECISION OF THE STATE COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It is argued by petitioner that this reason for granting the merit is readily apparent from the fact that the Alabama appellate courts allowed the trial court to prevent the accused from offering evidence in his own behalf and then allowed the prosecution to impeach the alibi testimony of the accused with highly improper questions which lacked factual pre-

dicates the cumulative effect of these two rulings resulted in a shocking deprivation of due process, the right of an accused to offer evidence in his own behalf and the right to a basic fair trial for the accused.

With respect to the accused not being allowed to offer evidence in his own behalf and to offer evidence to cooberate his alibi, petitioner alleges he offered receipts from motels and garages bearing dates to prove that he was out of state when the offense was committed and that the receipts were properly offered into evidence. Watson vs. State, 200 So.2d 270, has ruled that all evidence relating to the defense of alibi is for consideration of the jury, and in Dixon vs. State, 227 So.2d 740, it was noted "evidence of alibi is admissible for jury consideration and evaluation when it falls short of complete proof of absolute impossibility of

accused presence at alleged time and place of act. (Note T. 109 Court sustained State objection stating "I sustain the objection, the indictment alleges March 29th and it would be irrelevant where he was March 28th.") Also in Clarke vs. State, 115 So. 294, 22 Ala. App. 319, it was held "Refusal to admit express receipt issued to defendant on the issue of alibi, held error."

Following the trial court's refusal to allow petitioner to offer the hereinbefore mentioned evidence on his behalf, the trial court completely departed from the usual course of judicial proceedings by allowing the prosecution to impeach the defendant's alibi by aksing questions with no factual predicate at all, that is questions assuming facts of which he had no proof at all. The prosecution never offered an iota of rebuttal evidence to impeach the alibi, but merely asked ques-

tions which would cause the jury to reasonably infer that the prosecutor had knowledge of facts which would show that the receipts offered by Taylor were bogus and that people where Taylor claimed to have stayed and had his car repaired had told the prosecutor that Taylor was never there. In Benzotte vs. State, 358 So.2d 521, the defendant was prejudiced and denied due process by the cumulative effect of various acts of prosecutorial misconduct, including prosecutors impeachment questions to witness lacking factual predicate. Benzotte cites the American Bar Association Standards for Criminal Justice as follows, "It is improfessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence. And in Brasher vs. State, 112 So. 535, it was held that derogation of an adverse witness and his evidence by resort to illegal prac-

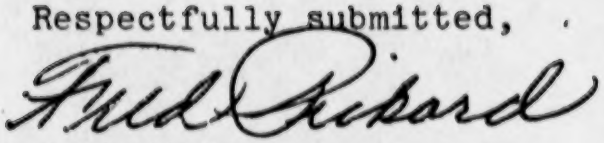
tice is improper, and it is improper for a questions on cross examination to assums a fact in controversy.

What was done by the prosecution in Taylor's case by asking the improper questions was certainly prejudicial to the defendant and denied him a fair trial, but when coupled with the trial court's refusal to allow properly admitted evidence to be introduced by the petition to cooberate his alibi, then Walter Taylor was completely stripped of his constitutional rights and the concepts of decency and fair play were traded for a conviction of the accused.

CONCLUSION

Wherefore, Petitioner respectfully request that this court hear his case and reverse the decision of the appellate courts of Alabama for the reasons cited herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 14 day of October, 1980, served a copy of the above and foregoing Petition for Writ of Certiorari on the Honorable Charles Graddick, Attorney General for the State of Alabama, by placing a copy of the same in the United States Mail, properly addressed to him at his office, 250 Administrative Building, Montgomery, Alabama 36130, with first class postage prepaid.

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APPENDIX A

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Walter Taylor

v.

State of Alabama

Appeal from Shelby Circuit Court
No. CC-79-263

"April 1, 1980. Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this Court and of the Circuit Court."

"April 22, 1980. It is ordered that the application for rehearing be and the same

is hereby overruled."

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the above are full, true and correct copies of the certificate of judgment rendered by the Court of Criminal Appeals on April 1, 1980, without opinion and the order overruling the application for rehearing by said Court on April 22, 1980.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 25th day of September, 1980.

CLERK OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

79-563

EX PARTE: WALTER TAYLOR
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (Re: Walter Taylor vs. State of Alabama)

The Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted to this Court, IT IS CONSIDERED AND ORDERED that the petition be denied, at the costs of the petitioner, for which costs let execution issue.

EMBRY, J.
TORBERT, C.J., MADDOX, FAULKNER AND ALMON, JJ., CONCUR.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 1st day of October, 1980.

J.O. Sentell

Clerk, Supreme Court of Alabama

NO. 80-673

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WALTER TAYLOR,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT AND/OR COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT, STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
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THOMAS R. JONES, JR.
ASSISTANT ATTORNEY GENERAL
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ADDRESS OF COUNSEL:

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(205) 834-5150

QUESTIONS PRESENTED

1. Whether the question of Petitioner's being denied the identity of the informer who observed Petitioner selling a controlled substance, diazapam, is within the jurisdiction of the Supreme Court where this issue was never presented to the highest court of the State of Alabama and was thus never reviewed by it.

2. Whether the question of Petitioner's being denied the right to introduce certain evidence at trial to prove alibi while the prosecution was allowed to impeach his testimony with questions regarding his alleged alibi is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State of Alabama and was thus not reviewed by it.

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MISCELLANEOUS:

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TO THE ALABAMA SUPREME COURT AND/OR COURT OF
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BRIEF FOR RESPONDENT, STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals in this case have not yet been reported but appear in Petitioners Appendix with the denial of certiorari by the Alabama Supreme Court.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257, and has presented two separate issues for consideration. It is Respondent's position that this Court is without jurisdiction to consider either issue asserted since neither was ever properly presented to the highest court of the State and was therefore not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

Respondent hereby adopts by way of reference the Petitioner's Statement of the Case as being substantially correct.

REASONS FOR DENIAL OF THE WRIT

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW AN ISSUE WHICH HAS NEVER BEEN PRESENTED OR REVIEWED BY THE STATE'S HIGHEST COURT.

On January 29, 1980, the Petitioner filed a brief and argument with the Alabama Court of

Criminal Appeals pursuant to his appeal of his conviction in the Circuit Court of Shelby County, Alabama. The Alabama Court of Criminal Appeals affirmed the conviction without rendering an opinion, and on April 14, 1980, the Petitioner applied for a rehearing in the Court of Criminal Appeals. The rehearing request was denied on April 22, 1980, and thereafter on May 5, 1980, the Petitioner petitioned for a writ of certiorari with the Alabama Supreme Court. The writ was denied on October 1, 1980.

The first issue asserted by the Petitioner's present petition to this Honorable Court concerns the trial courts refusal to require disclosure of the identity of an informer who allegedly witnessed the transaction that served as the basis of the criminal charge against the Petitioner. However, the Respondent respectfully points out to this Court that at no point in the state appellate process, as recited in the previous paragraph, did the Petitioner ever attempt to raise this issue or one closely similiar.

Therefore, the Petitioner is for the first time raising this particular issue and the Respondent respectfully argues that this Court is without jurisdiction to review such an issue.

It is provided in 28 U.S.C. §1257 that this Court's certiorari jurisdiction extends only to final judgments or decrees that are rendered by the highest Court of the state in which a decision should be had. This position has been adhered to by this Court in the two recent cases of Street v. New York, 394 U.S. 576, 22 L. Ed 2d 572, 89 S.Ct. 1354 (1969), and Michigan v. Tyler, 436 U.S. 499, 56 L. Ed 2d 486, 98 S.Ct. 1942 (1978). In Street v. New York, supra, it was held that if the question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Conclusion, the Respondent argues that the first issue asserted by the Petitioner has never been presented to the Alabama appellate court system in any manner. Therefore, the writ should be denied as to the first issue due to the absence of jurisdiction of this Court over that issue.

2. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW AN ISSUE WHICH HAS NOT PROPERLY BEEN PRESENTED TO AND REVIEWED BY THE STATE'S HIGHEST COURT.

On April 1, 1980, the Alabama Court of Criminal Appeals affirmed, without an opinion, Petitioner Taylor's conviction in the Shelby County Circuit Court. On April 14, 1980, Petitioner applied for a rehearing which was denied without opinion, by the Court of Criminal Appeals on April 22, 1980. Thereafter, Petitioner petitioned for a writ of certiorari in the Supreme Court of Alabama, and that petition was also denied without opinion.

Pursuant to Rule 39(k), Alabama Rules of Appellate Procedure (ARAP), the scope of review of the Supreme Court of Alabama is ordinarily limited to the facts stated in the opinion of the Court of Criminal Appeals. Petitioner's Application for Rehearing on April 14, 1980, failed to follow correct procedural law in a "No Opinion" affirmance and did not invoke Rule 39(k) in his application requesting the Court of Criminal Appeals to issue an opinion or statement of the facts of the case. The Alabama Supreme Court has consistently held that in the absence of a petitioner invoking Rule 39(k) ARAP in a "No Opinion" affirmance the petition is due to be stricken and the writ will be denied. See: Adams v. State, 362 So. 2d 654 (Ala. 1978); and Deerman v. State, 370 So. 2d 1107 (Ala. 1979). In Adams v. State, supra, the Alabama Supreme Court stated:

> "The Petition for Writ of Certiorari requests this Court to review a "No Opinion" affirmance by the Court of Criminal Appeals, Ala. App., 363 So. 2d 654, with the judgment of conviction and sentence ordered by the trial court. Petitioner does not invoke Rule 39(k), ARAP. Thus, the writ is denied."

The second federal question asserted by the Petitioner was not expressly passed on by the highest state court, due to a failure to conform to state procedure. As quoted earlier, in Street v. New York, 394 U.S. 576, 22 L. Ed 2d 572, 89 S.Ct. 1354 (1969), this Court said that if the question is not presented to the state courts in such a manner that it is decided by the highest court of the state when it affirms the conviction, then the Supreme Court has no power to consider the matter. Michigan v. Tyler, 436 U.S. 499, 56 L. Ed 2d 486, 98 S. Ct. 1942 (1978), held in accord with this same point.

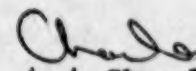
In Conclusion, the Petitioner presented nothing on this second issue before the Alabama Supreme Court for review. As stated earlier

with cited authorities, the Alabama Supreme Court will not review the merits of a "No Opinion" affirmance where the petitioner does not follow state procedural rules, Rule 39(k), ARAP, respectfully. Therefore, the highest state court has never reviewed the issue at hand.

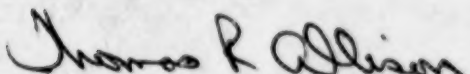
CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA



/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
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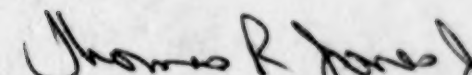

/s/ Thomas R. Jones, Jr.
THOMAS R. JONES, JR.
ASSISTANT ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of January, 1981, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama on each attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

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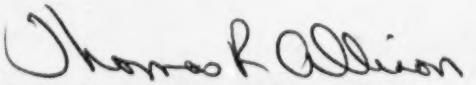

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